

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JULIE A. LYNN,) CASE NO. C07-1798-JCC
Plaintiff,)
v.) REPORT AND RECOMMENDATION
MICHAEL J. ASTRUE,) RE: SOCIAL SECURITY
Commissioner of Social Security,) DISABILITY APPEAL
Defendant.)
_____)

Plaintiff Julie A. Lynn proceeds through counsel in her appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied plaintiff's applications for Disability Insurance (DI) and Supplemental Security Income (SSI) benefits after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, the Court recommends that this matter be AFFIRMED.

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FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1978.¹ She attended special education classes but did not graduate from high school or obtain a GED. (AR 87.) Plaintiff previously worked as a laundry/kitchen worker and as a produce picker.² (AR 21.)

Plaintiff filed DI and SSI applications on May 21, 2004, alleging disability beginning October 1, 2001 due to Aspergers disorder. Her applications were denied at the initial level and on reconsideration, and she timely requested a hearing.

ALJ Edward Nichols held a hearing on October 11, 2006, taking testimony from plaintiff, her mother, and vocational expert Brian Sorenson. (AR 212-45.) On December 4, 2006, the ALJ issued a decision finding plaintiff not disabled. (AR 16-23.)

Plaintiff timely appealed. The Appeals Council denied plaintiff's request for review on September 6, 2007 (AR 6-9), making the ALJ's decision the final decision of the Commissioner. Plaintiff appealed this final decision of the Commissioner to this Court.

JURISDICTION

The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

DISCUSSION

The Commissioner follows a five-step sequential evaluation process for determining whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must

¹ Plaintiff's date of birth is redacted back to the year of birth in accordance with the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

² Because plaintiff earned below substantial gainful activity levels at these jobs, the ALJ found this did not constitute past relevant work. (AR 21.)

01 be determined whether the claimant is gainfully employed. The ALJ found plaintiff had not
02 engaged in substantial gainful activity since her alleged onset date. At step two, it must be
03 determined whether a claimant suffers from a severe impairment. The ALJ found plaintiff's
04 depression, attention deficit hyperactivity disorder, learning disabilities involving math and writing,
05 and a history of Asperger's Syndrome severe. Step three asks whether a claimant's impairments
06 meet or equal a listed impairment. The ALJ found that plaintiff's impairments did not meet or
07 equal the criteria for any listed impairment.

08 If a claimant's impairments do not meet or equal a listing, the Commissioner must assess
09 residual functional capacity (RFC) and determine at step four whether the claimant has
10 demonstrated an inability to perform past relevant work. The ALJ found plaintiff to have no
11 physical limitations and therefore retained the RFC to perform very heavy work, and to be capable
12 of lifting 100 pounds or more occasionally, 50 pounds or more frequently, and to stand, sit or walk
13 for about six hours in an eight hour work day. With respect to plaintiff's mental abilities, the ALJ
14 found plaintiff capable of simple, repetitive work that is shown by demonstration, in a position
15 with limited contact with co-workers and the public. Plaintiff was found capable of doing tasks
16 that involve limited writing or math, and no rapid hand/eye coordination The ALJ determined that
17 plaintiff had no past relevant work.

18 If a claimant demonstrates an inability to perform past relevant work, the burden shifts to
19 the Commissioner to demonstrate at step five that the claimant retains the capacity to make an
20 adjustment to work that exists in significant levels in the national economy. The ALJ found that
21 the Medical-Vocational Guidelines support a finding that plaintiff is not disabled, whether or not
22 she has transferable job skills. However, because plaintiff's ability to perform work at all

01 exertional levels has been compromised by non-exertional limitations, the ALJ relied on the
02 testimony of the vocational expert in making the step five finding that plaintiff could perform
03 work, such as a laundry worker or a kitchen helper, that exists in significant numbers in the
04 national economy. Therefore, the ALJ found plaintiff to be not disabled.

05 This Court's review of the ALJ's decision is limited to whether the decision is in
06 accordance with the law and the findings supported by substantial evidence in the record as a
07 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more
08 than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable
09 mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750
10 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's
11 decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.
12 2002).

13 Plaintiff argues³ that the ALJ erred in finding her able to perform the duties of laundry
14 helper or kitchen helper.⁴ Specifically, plaintiff contends that the ALJ failed to consider all
15 relevant evidence in the record relative to her mental RFC, and erred in finding her able to function
16 well enough to work when properly medicated and in finding her daily activities not consistent
17 with disability. Plaintiff further argues that the vocational expert did not properly assess the
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19 ³ Plaintiff's Opening Brief contains a lengthy Statement of Facts. The parties are reminded
20 that such a recitation is unnecessary and, in fact, discouraged. Rather, a discussion of the relevant
21 facts and portions of the administrative record should be conducted in the context of specific
assignments of error.

22 ⁴ Plaintiff suggests that the ALJ also found her capable of performing the job of "stores
laborer," but the ALJ did not include this job in the step five finding. (AR 22.)

01 requirements of the positions identified at step five of the sequential analysis. She requests remand
02 for an award of benefits or, in the alternative, for further administrative proceedings. The
03 Commissioner argues that the ALJ's decision is supported by substantial evidence and should be
04 affirmed.

05 Mental Residual Functional Capacity

06 Plaintiff argues that the ALJ did not take into account the severity of her Asperger's
07 Syndrome in determining her mental RFC. She alleges the ALJ did not consider all relevant
08 evidence in the record relative to this issue. Plaintiff argues that educational and medical records
09 clearly indicate a diagnosis of Asperger's disorder, citing as well to the Social Security
10 Administration's Listing of Impairments, 20 C.F.R. Pt. 404, Subpt. P. App. 1, § 12.10, "Autistic
11 disorder and other pervasive developmental disorders".

12 Contrary to plaintiff's contention, the ALJ specifically discussed plaintiff's Asperger's
13 disorder and considered the effect of that condition on her ability to function. The ALJ discussed
14 the opinion of examining psychologist Alan Breen, Ph.D., who opined that plaintiff had adequate
15 attention and concentration during the examination, moderate difficulty in functioning, and would
16 likely improve on medication. (AR 19, 21.) The ALJ discussed the examination and testing
17 conducted by psychologist Karen Anderson, Ph.D., who concluded that plaintiff was functioning
18 in the average range of intellectual ability with some deficits in her non-verbal abilities. (AR 19.)
19 The ALJ took into account the opinion of consulting psychiatrist Anne Thomas, M.D., who
20 diagnosed plaintiff with Asperger's disorder and depression. The ALJ noted Dr. Thomas' opinion
21 that plaintiff would have difficulty completing complex tasks but might be able to complete simple
22 tasks that did not involve multi-tasking, and might have difficulty getting along with supervisors

01 and co-workers. (AR 19, 21.) Dr. Thomas also opined that plaintiff might have difficulty working
02 on a consistent basis. The ALJ gave Dr. Thomas' opinion "some but not great weight" to the
03 extent that the opinion was not entirely consistent with the objective evidence of record,
04 incorporating the rest of the opinion into the RFC assessment. (AR 21.) The ALJ is responsible
05 for resolving conflicts in the medical evidence. *Sample v. Schweiker*, 694 F.2d 639, 642 (9th Cir.
06 1982).

07 It is unclear if plaintiff is arguing that the ALJ erred by failing to find that she met the
08 listing requirements for Asperger's disorder at step three of the sequential analysis. Plaintiff bears
09 the burden of proving the existence of impairments meeting or equaling a listing. *Burch v.*
10 *Barnhart*, 400 F.3d 676, 683 (9th Cir. 2005). The diagnosis of an impairment is not enough. The
11 claimant must show that she has the findings shown in the listing of that impairment. *Key v.*
12 *Heckler*, 754 F.2d 1545, 1549-50 (9th Cir. 1985). *See also Sample*, 694 F.2d at 642 ("The
13 existence of emotional disorder, however, is not *per se* disabling . . . there must be proof of the
14 impairment's disabling severity.") Although plaintiff argues that the ALJ failed to consider all
15 relevant evidence in the record relative to her mental RFC, she does not, in fact, cite any evidence
16 that the ALJ failed to consider or offer any analysis of how the ALJ erred in concluding that she
17 did not meet the listing requirements.

18 In sum, plaintiff does not demonstrate error in the ALJ's consideration of her Asperger's
19 disorder, in evaluating the medical evidence of record, or in finding that this condition did not meet
20 the listing of impairments at step three of the sequential analysis.

21 Consideration of Daily Activities

22 Plaintiff argues that the ALJ erred in finding that she was able to function well enough to

01 work when properly medicated and that her daily activities are not consistent with disability. Since
02 it is not the function of the reviewing court to simply re-weigh the evidence, plaintiff's argument
03 will be construed as an argument that these findings lacked the support of substantial evidence.

04 In finding plaintiff able to work, the ALJ primarily relied on the medical evidence of record
05 and the opinions of the medical experts, "[who] all seem to think the claimant can do some kind
06 of low level work." (AR 21.) The ALJ considered the fact that plaintiff had previously been able
07 to work as a laundry/kitchen worker at the YWCA for nine months as evidence of her capability
08 to do some type of work activity. The ALJ also found plaintiff's daily activities "not consistent
09 with disability":

10 She cleans her home, does laundry, goes shopping, and prepares meals. She cares for
11 herself and her two children, ages two and nine. Socially, she maintains a relationship
12 with her mother, sister, a boyfriend, and another close friend, although she complains
13 that she is otherwise socially isolated. Particularly telling of her true level of
functioning is her recent statement to her mental health provider that she would "like
to be on SSI and have at least a part-time job." It appears that the claimant's lack of
motivation, rather than her impairments, prevents her from working.

14 Finally, I note that the claimant actually worked after the date she alleges she became
15 disabled and unable to work. The claimant worked for a period of nine months as a
laundry/kitchen worker at the YWCA. This is persuasive evidence that the claimant
is capable of some type of work activity.

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17 (AR 20-21, internal citations to administrative record omitted.)

18 An ability to take care of personal needs, prepare easy meals, do light housework, and shop
19 for some groceries may be seen as inconsistent with a condition that precludes all work activity.
20 *Curry v. Sullivan*, 925 F.2d 1127, 1130 (9th Cir. 1990). While plaintiff may disagree with the
21 ALJ's interpretation of the evidence in the record, she fails to show that the ALJ's interpretation
22 was not rational. *See Thomas*, 278 F.3d at 954. *See also Sample*, 694 F.2d at 642 ("Our sole

01 inquiry is whether the record, read as a whole, yields such evidence as would allow a reasonable
02 mind to accept the conclusions reached by the law judge.”) (citing *Richardson v. Perales*, 402
03 U.S. 389, 401 (1971)).

04 Step Five Finding

05 Plaintiff contends that the vocational expert (VE) failed to properly assess the requirements
06 for the jobs identified as within her functional capacity to perform. Plaintiff further argues that the
07 ALJ erred in failing to resolve the conflict between the testimony of the VE and the requirements
08 of the jobs as found in the Dictionary of Occupational Titles (DOT).

09 The ALJ need only include impairments in a hypothetical posed to a VE that are supported
10 by substantial evidence in the record. *Osenbrock v. Apfel*, 240 F.3d 1157, 1164 (9th Cir. 2001).
11 Here, the ALJ posed a hypothetical to the vocational expert (VE), asking the expert to identify
12 jobs that could be performed by a younger individual with an eleventh grade education in special
13 education, Asperger’s syndrome, attention deficit disorder, learning disabilities in math and
14 writing, depression, no exertional restrictions, non-exertional limitations of simple, repetitive,
15 two/three step work preferably shown by demonstration and fairly minimal coworker and public
16 contact, no rapid hand/eye coordination, and no complicated schematics or instructions or
17 sequential memory items. (AR 238-39.) In response, the VE testified that the individual could
18 perform the job of laundry worker II, with a DOT classification of 361.685-081, and kitchen
19 helper, with a DOT classification of 318.687-010. (AR 239-40.) In response to questioning from
20 plaintiff’s counsel, the VE testified that the jobs would not require multitasking (doing many tasks
21 “all at once”) and testified that the jobs required limited contact or cooperation with coworkers.
22 (AR 242-43.) Relying on this testimony, the ALJ found plaintiff capable of performing these

01 occupations, existing in significant numbers in the state and national economy and, therefore, not
02 disabled.

03 Plaintiff argues that the positions of kitchen helper and laundry worker II require the ability
04 to accomplish a variety of tasks in no particular order and, therefore, the VE's testimony about
05 the requirements of the jobs conflicted with the DOT. Plaintiff's argument is nonavailing. The
06 VE explained in his testimony that, while the tasks required of the kitchen helper or laundry
07 worker II might vary throughout the workday, they were not required to "multitask", that is, to
08 do the tasks all at the same time. (See AR 242 ("I would say there's a few simple tasks . . . for
09 each of those jobs that they commonly would, in a given day, switch to.")) Plaintiff fails to show
10 any discrepancy between the jobs identified by the VE and the DOT description of those jobs, and
11 fails to show a lack of substantial evidence for the ALJ's finding that the VE's testimony was
12 consistent with the DOT.

13 **CONCLUSION**

14 For the reasons set forth above, this matter should be AFFIRMED.

15 DATED this 1st day of May, 2008.

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17 Mary Alice Theiler
18 United States Magistrate Judge
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